REPLY COMMENTS OF THE AMERICAN LIBRARY ASSOCIATION
ON THE FEDERAL COMMUNICATIONS ACT
NOTICE OF PROPOSED RULEMAKING REGARDING THE
CHILDREN'S INTERNET PROTECTION ACT

These Reply Comments are filed on behalf of the American Library Association (ALA). They respond to the request for Comments and opportunity for Reply Comments in the Federal Communications Commission's Notice of Proposed Rule (NPRM) published in the *Federal Register* on January 31, 2001 (66 Fed. Reg. 8371).

Preliminary Comments

ALA is gratified that, in comments on the initial proposals made by the FCC, there has been overwhelming support for establishing Year 5 as the first program funding year for which CIPA and NCIPA will be applied and for utilizing the Form 486 as the vehicle for certifying compliance under the new legislation. Many schools and libraries made clear that preparations for Year 4 have already been made; in fact, the Commission itself has prohibited changes in services requested through the Form 470 (RFP) and application, unless strict criteria are met. Under those criteria, changes in services cannot be made if they would change functionality, increase costs, violate a contract provision, or increase the percentage of ineligible services. (*See* Order, In the Matter of Request for Guidance by Universal Service Administrator Concerning Request of Lost Angeles Unified School District, File No. SLD-198056, CC Doc. Nos. 96-45, 97-21 (Feb. 13, 2001).) These criteria could not be sustained if Year 4 were used to initiate CIPA compliance.

While most commenters also agreed on a number of other issues addressed by ALA, we will use these reply comments specifically to address matters raised by commenters that appear to require some clarification or response. We take this opportunity to urge the FCC to assess all comments against the important goals stated by the Commission in its NPRM: implementing the new statute "in a way that is administratively efficient and fair to applicants" (¶ 10); continuing "to reduce paperwork burdens" (PRA Statement); and obtaining certifications in "the most efficient and effective way (¶ 6)."

Filtering Technology is Imperfect

There appears little doubt that filtering technology cannot live up to its own definition: none exists that blocks *all* "visual depictions" covered by CIPA (as defined in CIPA § 1703(b)(1)) and *only* visual depictions covered by CIPA. Hence there is a danger that a library or school filing a certification that it is in compliance with CIPA may be unreasonably – in fact, irrationally – held to a standard that requires use of a product that does not exist. ALA thus agrees with a number of commenters that the Commission should include in the CIPA certification an additional sentence proposed by, for example, the New York Library Association and the State of Wisconsin Department of Public Instruction, stating: "Such compliance protects against access to visual depictions referenced in this act, but it may not be able to prevent access to all visual depictions so referenced."

This specific qualification included in the certification should be explained in the Statement of Basis and Purpose of the rule as being designed to protect applicants from liability for, or charges of, having made a false statement in the certification, even though the applicant had made a good faith effort to comply with the law through adopting an Internet safety policy that included technology reasonably designed to accomplish the objectives of CIPA. Good faith compliance efforts should plainly satisfy the requirements of CIPA.

Consortia Certification, Waivers, Enforcement

Consortia Certification. ALA recommended in its initial comments that consortia, library networks, and other library-related entities be charged with providing certification for their members based upon receipt of evidence from those members attesting compliance. Some commenters, for example, the Consortium for School Networking and the International Society for Technology in Education, persuasively urged that consortium members should have the option of providing their certifications *directly* to the Commission. ALA concurs that this kind of flexibility would be consistent with the objectives of the rules and the statute.

We strongly urge, however, that direct certification by consortia members be only an option, not a requirement (as is urged by, for example, the American Center for Law and Justice). Because of the many varied and unique arrangements under the universal service discount program, having the flexibility for consortia members to file certifications where needed should be understandable. However, since this direct member certification will impose a tremendous burden on both the members and the government, it should never be required. Appropriate certification forms will have to be developed to facilitate this objective, since consortium members do not automatically otherwise file any E-rate form with the FCC.

Waivers. It is quite possible that members of consortia, library networks, and other library-related entities may require waivers as specifically provided by CIPA. This will necessitate the adoption of a waiver procedure that is open to these members, as well as to the direct applicants themselves. It will also require inclusion of certification language to be filed by consortia that members not in compliance have received waivers as provided by law.

Enforcement. It is quite clear from many comments to the FCC that one of the most vexing problem areas raised by CIPA is how consortia, library networks, and other library-related entities are to be treated; enforcement is not immune from this diagnosis, as reflected in a number of comments on the NPRM. It is thus important that the FCC clarify in the final rule that—

A consortium, library network, or other library-related entity remains eligible for E-rate discounts or funding even where a member does not certify CIPA compliance.

The consortium, library network, or other library-related entity will, however, have the responsibility to ensure that any noncomplying member will not receive E-rate discounts or funding by virtue of its membership in the consortium.

Preexisting Acceptable Use Policy

A number of commenters (including, for example, the American Association of School Administrators) requested that the Commission clarify that existing acceptable use policies that comply with CIPA and NCIPA should suffice as compliant Internet safety policies without the need for readoption and new hearings. ALA agrees. Considering the limited resources available to schools and libraries in general, a repetitive or duplicative adoption of a preexisting acceptable use policy that complies fully with both the substantive and procedural requirements of the new statute would be redundant and hence should not be required; this should specifically be authorized by FCC rule.

Disabling for Adult Use

A number of commenters, especially from the library community, urged the Commission to make clear that CIPA compliance is not jeopardized if the filtering technology is disabled at a workstation dedicated only to adult use, without the librarian having to enable and then disable the filter between patrons. ALA believes that, so long as the adult use is for bona fide research or other lawful purposes – a determination that can be made individually or generically and embodied in the acceptable use (Internet safety) policy of the library – CIPA compliance should be complete. While it would be helpful if the FCC provides specific approval in its rule for this approach, we do not believe that the FCC's failure to address this subject specifically will deprive libraries of the flexibility needed for compliance in an efficient manner suited to local needs, resources, and conditions.

Avoid Redundant Certification Language

Some commenters proposed that not only should the certification include a statement that the school or library is "in compliance with" CIPA, but also that an additional statement be provided as an option, indicating that the applicant "is in the process of complying with" CIPA. ALA believes that this proposal is redundant and potentially confusing, and should be rejected. CIPA plainly contemplates that, during the first program year

covered, a school or library either shall have in place an Internet safety policy and filtering or blocking technology or shall be "undertaking such actions . . . to put in place" such policy and technology. (47 U.S.C. § 254(h)(6)(E)(ii)(II)(aa) (as to libraries).) Since certification of compliance with the statute encompasses both alternatives, redundancy is unnecessary.

Enhanced Enforcement Proposals

ALA notes with some irony that the only commenters who recommend expanded reporting or enhanced enforcement requirements are those who are not responsible in any way for running a library, school, school system, or consortium – including responsibilities for balancing budgets, hiring personnel, filling out forms, and otherwise implementing requirements of the local, state, and federal law, while assisting library patrons or teaching children! In fact, suggestions for detailed reporting are made by the representative of product manufacturers who would themselves reap financial benefits from these requirements, at the expense of libraries and their users and of schools and their students.

CIPA was intended to serve the purpose of protecting children who use the Internet. In attempting to do so, it already portends additional costs and burdens on the schools and libraries of our nation. CIPA was not intended to advance the interests of manufacturers of filtering or blocking technology. It is inconceivable that the rules implementing this legislation should have the effect of imposing even greater costs and burdens on schools, even if that would promote the financial interests of those who promote filtering technology.